

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RICHARD FRANK THOMAS,

Defendant-Appellant.

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UNPUBLISHED

June 25, 2013

No. 309353

Kent Circuit Court

LC No. 11-005143-FC

Before: BORRELLO, P.J., and MURPHY, C.J. and SERVITTO, J.

PER CURIAM.

Defendant Richard Frank Thomas appeals as of right his conviction for first-degree murder, MCL 750.316. He was sentenced to life imprisonment without the possibility of parole. We affirm.

Defendant's conviction arises out of the October 24, 1971, murder of Elijah Todd Butler. Defendant previously dated the victim's wife, Geraldine Butler. When defendant learned that Geraldine and the victim planned to marry, he repeatedly threatened to rape and kill Geraldine unless she broke off the wedding. Geraldine refused and she and the victim were married on October 20, four days before the homicide. On the day of the homicide, Geraldine saw defendant drive past her house in a Ford Fairlane that belonged to defendant's cousin. Later that afternoon, Geraldine and the victim drove from her house to the home of the victim's mother, which was located in the same neighborhood. On the way, they passed defendant, who was standing on the side of the road in front of his cousin's car with the hood open. Geraldine observed that defendant could see both her and the victim as they drove by defendant. As Geraldine had done previously, based on defendant's controlling and threatening behavior, she warned the victim that defendant was a dangerous individual. Later, while removing luggage from their vehicle at the victim's mother's house, Geraldine and the victim saw defendant drive past the end of the block in the Ford Fairlane. That night, while at her mother-in-law's house, Geraldine, along with the victim, heard noises coming from outside. Geraldine was concerned that it might be defendant trying to harm them. When the victim went to investigate the noises for a second time, he was shot repeatedly through a window in the back door with a .22 caliber firearm. Before he died, the victim told Geraldine, "Geri, he did it." Defendant was not arrested and tried for this homicide until 2011, 40 years after the offense was committed.

On appeal, defendant argues that his constitutional right to due process was violated by the 40-year delay between commission of the offense and his arrest. We disagree. Because defendant did not raise this issue at trial, it is unpreserved. *People v Metamora Water Serv, Inc*, 276 Mich App 376, 382; 741 NW2d 61 (2007). We review unpreserved appellate arguments for plain error affecting a defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

“‘Mere delay between the time of the commission of an offense and arrest is not a denial of due process. There is no constitutional right to be arrested.’” *People v Patton*, 285 Mich App 229, 236; 775 NW2d 610 (2009), quoting *People v Anderson*, 88 Mich App 513, 515; 276 NW2d 924 (1979). However, charges should be dismissed when a prearrest delay results in actual and substantial prejudice to a defendant's right to a fair trial and the prosecution intended to gain a tactical advantage by way of the delay. *Patton*, 285 Mich App at 237. If a defendant demonstrates the requisite prejudice, “the prosecution must then persuade the court that the reason for the delay sufficiently justified whatever prejudice resulted.” *Id.* “[A]n investigative, as opposed to tactical, delay does not violate the Due Process Clause of the Fifth Amendment[.]” *People v Adams*, 232 Mich App 128, 140; 591 NW2d 44 (1998).

With respect to the necessary prejudice, “[s]ubstantial prejudice is that which meaningfully impairs the defendant's ability to defend against the charge in such a manner that the outcome of the proceedings was likely affected.” *Patton*, 285 Mich App at 237. “This Court has reiterated that proof of ‘actual and substantial’ prejudice requires more than generalized allegations.” *Adams*, 232 Mich App at 135. In *Adams*, this Court, quoting *People v Loyer*, 169 Mich App 105, 120; 425 NW2d 714 (1988), observed:

“A defendant shoulders the burden of coming forward with evidence of prejudice. Until he does so, the prosecution's burden – to persuade the court that the delay was justified in the face of any resulting prejudice – is not triggered. The imperfection of a witness' memory may be exposed to the trier of fact during direct or cross-examination and may be emphasized to buttress or undermine credibility. If such absence of memory by a defendant's material witness due to a lengthy prearrest delay seriously impedes or significantly hinders a defendant in presenting his case, prejudice, of course, would be shown, and the prosecution would be required to demonstrate how that prejudice was justified by the prearrest delay. In this case, however, no such impediment or hindrance was manifest. Moreover, we decline to accept defendant's assertion on appeal that ‘the exceptionally long delay in the present case should itself raise a strong inference of prejudice.’ Without specific references to instances of prejudice-generating occurrences, and without specific allegations of actual prejudice resulting therefrom, the prosecution would be at an insuperable disadvantage indeed in attempting to show how such unspecified prejudice was in fact justified.” [*Adams*, 232 Mich App at 135.]

Here, defendant asserts that the delay was not the result of an ongoing investigation, that there had been no investigation between the mid-1970s, when defendant was sentenced to mandatory life in a different murder case, and 2010, that the police had believed all along that defendant had committed the murder, and that the prosecutor indicated below that the case was

not pursued further in 1971 because defendant had been sent back to prison on a parole violation shortly after the murder. Defendant additionally contends that all of the witnesses related to the murder case were available in 1971, but the police nonetheless failed to speak to many of the witnesses in 1971 and instead waited to talk to them for the first time nearly 40 years later, and that the same investigative and evidentiary avenues eventually pursued by the police had also been available from the beginning.

With respect to prejudice, defendant contends that Linda Thomas, who was the wife of defendant's cousin alluded to above, had confirmed his alibi back in 1971; however, the prosecution was able to exploit her memory loss on the matter at the time of trial. According to a 1971 police report, Thomas informed police that she, defendant, Lacy Harris, and three small children were at her home at the time of the shooting. At trial, Thomas testified that she had no memory of the evening and did not even recall talking to the police. And in connection with Thomas, defendant maintains that Thomas's memory loss compromised his ability to effectively cross-examine Lacy Harris. Harris, who was another one of defendant's cousins, testified that she was at Thomas's home on the night of the murder, that, at some point during the evening, defendant arrived at the house appearing nervous, and that defendant told her and the others present that should any one ask where he had been, they were to say that he had been with them all evening. Harris also testified that Thomas was present at the time. Defendant further argues that another alibi witness, Raymond Tardy, died 20 years after the murder and that Tardy's wife, who died before trial but after the preliminary examination, could not recall the events from 40 years earlier. There is no indication in the record that Mr. or Mrs. Tardy would have been able to provide defendant with an alibi at or around the time of the shooting, other than a purported statement made by defendant to police in 1971 that he had been at the Tardy home watching football at or around the time of the homicide.<sup>1</sup>

We first examine defendant's prejudice argument in the context of any detrimental impact of the 40-year delay on Thomas's memory. We conclude that it is insufficient to establish substantial prejudice that meaningfully impaired defendant's ability to defend against the murder charge in such a manner that the outcome of the proceedings was likely affected. *Patton*, 285 Mich App at 237. The police report from 1971, wherein Thomas provided information that would support an alibi defense, was admitted into evidence by stipulation of the prosecution. Accordingly, defendant was not left with a complete absence of evidence to attack Harris's credibility and to establish his claimed alibi. The alibi defense, despite the 40-year delay, remained available by way of the police report. Thomas testified that she would not have lied to protect defendant, which gives support for her comments to police in 1971. Furthermore, Thomas did not recant or otherwise disavow the 1971 statement to police.

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<sup>1</sup> At the preliminary examination, the prosecutor, in structuring a question for Mrs. Tardy, stated, "When the defendant was arrested that night, he told police that he was, at the time of the murder – at or about the time of the murder, that he would have been with you, and your husband, and your family watching football."

With respect to defendant's prejudice argument in the context of any detrimental impact of the 40-year delay on Mrs. Tardy's memory, along with the fact that the late Mr. Tardy was no longer available to testify, there is no indication in the record that the Tardys themselves ever even hinted at being able to provide defendant with an alibi defense. Assuming defendant made the statement to police that, as described by the prosecutor, he was with the Tardys at or around the time of the crime, and assuming that the Tardys would have actually so testified had this case proceeded to trial in the 1970s, there seemingly would have been a direct conflict in defendant's alibi defense – was he with Thomas and Harris or the Tardys at or around the time of the homicide. This would cause a reasonable juror to suspect fabrication relative to any alibi defense. The prejudice claim associated with the Tardys is too speculative and tenuous to merit further consideration of defendant's due process argument. Further, there is nothing in the record to suggest that the prosecution intended to gain a tactical advantage by way of the delay.

Defendant bootstraps an ineffective assistance of counsel argument in relationship to the prearrest delay argument, but this fails because trial counsel is not ineffective for failing to make a futile motion. *People v Fike*, 228 Mich App 178, 182-183; 577 NW2d 903 (1998).

Finally, defendant argues that the trial court erred by admitting evidence of two prior bad acts under MRE 404(b) to prove defendant's identity. The first act was a 1970 breaking and entering in which defendant used a .22 caliber rifle to shoot through the window of a Sunoco gas station. The second act was a 1974 incident in which defendant shot the owner of that same Sunoco station with a .22 caliber firearm. MRE 404(b)(1) provides:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

When the trial court addressed the 1970 breaking and entering crime, it stated, "I think that comes in under plan, scheme, system, knowledge." When the trial court addressed the 1974 shooting, it found that the evidence was admissible to show "common scheme, plan, system." As to both prior bad acts, the trial court ruled that they were not being offered to show propensity. The trial court instructed the jury that it could consider evidence of the two prior bad acts only for purposes of "motive, opportunity, intent, preparation, scheme, plan, system of doing an act, knowledge, identity, absence of mistake or accident," and no other purpose.

Defendant's entire appellate argument is based solely on "identity" analysis, absent any analysis whatsoever on the other purposes set forth in the jury instruction and in the court's rulings on the 1970 and 1974 acts. There is no argument that the evidence was inadmissible to show "scheme, plan, or system in doing an act," MRE 404(b)(1), even though this language formed the specific basis of the trial court's rulings. Accordingly, because of defendant's complete failure to argue inadmissibility for listed and acceptable purposes under MRE 404(b)(1) relied on by the court, other than identity, defendant has effectively waived any claim that the evidence should have been excluded. See *City of Riverview v Sibley Limestone*, 270

Mich App 627, 638; 716 NW2d 615 (2006) (“[A] party’s failure to brief an issue that necessarily must be reached precludes appellate relief.”) Assuming that the trial court erred in allowing the jury to consider the evidence for the particular purpose of identity, defendant has failed to prove any prejudice, given that the evidence was otherwise admissible and subject to consideration by the jurors, except for propensity purposes, in light of defendant’s lack of argument regarding the other purposes. Reversal is unwarranted.

Affirmed.

/s/ Stephen L. Borrello

/s/ William B. Murphy

/s/ Deborah A. Servitto